

*Futurewise, et al. v. W. Wash. Growth Mgmt. Hr'gs Bd., et al.*

No. 80396-0

CHAMBERS, J. (dissenting) — The majority is unnecessarily critical of the Department of Ecology (Ecology) and the Growth Management Act (GMA), chapter 36.70A RCW. The majority's conclusion today is clearly driven by the belief that the Shoreline Management Act of 1971 (SMA), chapter 90.58 RCW, is wiser and more attractive than the GMA. This belief leads the majority to its overly simplistic and erroneous conclusion that because the city of Anacortes had a shoreline master plan in place in 2003, it had met its legal obligations to protect the critical areas of its shorelines, even though it had not been required to meet the relevant legal standards when designing that plan. Admittedly, harmonizing the SMA and the GMA is a challenge, both for local governments and this court. However, I must dissent because our role when interpreting statutes, which is all we are called upon to do today, is to implement the intent of the legislature. It is not to evaluate the merits of the legislation. We best achieve the goals of the legislature by interpreting its plain words in context. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). When we read both acts together, it is clear our legislature intended to transfer management of critical areas in shorelines from the GMA to the SMA in an orderly, measured process and upon the approval of shoreline master plans that specifically protect critical areas.

The people of this state enacted the SMA in 1971, and 19 years later our

legislature followed up with the GMA. Laws of 1971, 1st Ex. Sess., ch. 286; Laws of 1990, 1st Ex. Sess., ch. 17. Under both acts, local governments manage the use of local land in compliance with state law and in cooperation with the State. RCW 36.70A.070, .106, .130, .250 (GMA); RCW 90.58.050, .070, .080, .090 (SMA). After much study, the legislature made its first attempt to coordinate the two acts five years after enacting the GMA. Laws of 1995, ch. 347. In due course, a local government's attempt to plan under the coordinated acts was litigated and came before a growth management hearings board. *See Everett Shorelines Coal. v. City of Everett*, No. 02-3-0009c, at 3 (Cent. Puget Sound Growth Mgmt. Hr'gs Bd. Jan. 9, 2003). The board concluded that shorelines of statewide significance under the SMA were also categorically critical areas under the GMA, and thus, shoreline management often had to comply with both acts. *Id.* at 17.

In response, the 2003 legislature amended both the SMA and the GMA. Engrossed Substitute H.B. 1933, 58<sup>th</sup> Leg., Reg. Sess. (Wash. 2003) (hereinafter ESHB 1933). I completely agree with the majority that the overarching legislative purpose was expressed clearly:

The legislature intends that critical areas within the jurisdiction of the shoreline management act shall be governed by the shoreline management act and that critical areas outside the jurisdiction of the shoreline management act shall be governed by the growth management act.

ESHB 1933, § 1(3). But the legislature did much more than merely declare that critical areas in shorelines were to be managed under the SMA as the majority

suggests. It also raised the bar for that management, requiring local governments to consider the goals and policies of the SMA when planning under the GMA. ESHB 1933, § 5(1) (codified as RCW 36.70A.480(1)). It directed Ecology to approve only those shoreline master programs that provide at least as much protection to relevant critical areas as the local critical areas ordinances would have. ESHB 1933, § 3(4) (codified as RCW 90.58.090(4)). And, most importantly for us today, it tells us *when* that transfer should take place:

*As of the date the department of ecology approves a local government's shoreline master program adopted under applicable shoreline guidelines, the protection of critical areas as defined by [the GMA] within shorelines of the state shall be accomplished only through the local government's shoreline master program and shall not be subject to the procedural and substantive requirements of this chapter.*

RCW 36.70A.480(3)(a) (emphasis added). This language is prospective. *Cf. In re Estate of Burns*, 131 Wn.2d 104, 110, 928 P.2d 1094 (1997). As of the date Ecology approves a municipal shoreline master program adopted under shoreline guidelines that protect critical areas,<sup>1</sup> management of critical areas within shorelines shall be done under the SMA, not the GMA. If the legislature intended the transfer from the GMA to the SMA to occur immediately, it was fully capable of saying so.

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<sup>1</sup> The legislature was well aware that there were no shoreline guidelines in place when it enacted ESHB 1933. *See, e.g.*, ESHB 1933, § 1(1). This was because Ecology's initial attempt to draw these guidelines was struck down by the Shorelines Hearings Board and new regulations were not substantially in place until December 2003. *See Assoc. of Wash. Bus. v. Dep't of Ecology*, SHB No. 00-037, Order Granting and Den. Appeal (Shorelines Hearings Board Aug. 27, 2001), available at <http://www.eho.wa.gov/searchdocuments/2001%20archive/shb%2000-037%20final.htm>; *see also* ch. 173-26 WAC.

Instead, it made that transfer contingent on a future event; Ecology's approval of a revised shoreline master program approved wider applicable shoreline guidelines.

While I believe that the plain language permits no other interpretation, this interpretation also fits best within the larger statutory backdrop. Again, the 2003 legislature required, for the first time, that shoreline master programs protect critical areas as defined by the GMA. ESHB 1933, § 3(4) (codified as RCW 90.58.090(4)). ESHB 1933 also imposed two new substantive requirements on Ecology before Ecology could approve a shoreline master program. Now, Ecology can approve only shoreline master programs that (1) are consistent with RCW 90.58.020 and applicable shoreline guidelines and (2) provide protection that is "at least equal to that provided by the local government's critical areas ordinances." ESHB 1933, § 3(4) (codified as RCW 90.58.090(4)). These requirements were not in place when Anacortes's existing shoreline master program was approved. The legislature also expanded the reach of the SMA with ESHB 1933 to include "land necessary for buffers for critical areas, as defined in chapter 36.70A RCW, that occur within the shorelines of the state." ESHB 1933, § 2(2)(f)(ii) (codified as RCW 90.58.030(2)(f)(ii)). That is a significant expansion of the land under the jurisdiction of the SMA and strong reason to believe that the legislature intended the transfer to happen only after municipalities had the opportunity to revise their GMA and SMA plans with these statutory changes in mind.

Whether we look only at the timing provision of RCW 36.70A.480(3)(a) or at the larger statutory scheme, we should reach the same conclusion. The 2003

legislature intended to transfer protection of the relevant critical areas from the GMA to the SMA as municipalities enact, and Ecology approves, new shoreline master programs. Deciding otherwise does violence to the legislature's clearly expressed purpose that management of critical areas under the SMA take on some of the features of management under the GMA. Since the majority reaches a contrary conclusion, I respectfully dissent.

AUTHOR:

Justice Tom Chambers

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WE CONCUR:

Chief Justice Gerry L. Alexander

Justice Susan Owens

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Justice Mary E. Fairhurst

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